

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

PAUL L. NICHOLAS, SHAUNET S.
NICHOLAS and PAUL L. and
SHAUNET S. NICHOLAS, as Parents
and Next Friends of Erin Michelle
Nicholas, an infant under the
age of eighteen years,

Plaintiffs,

v.

CIVIL ACTION NO. 1:03CV276
(Judge Keeley)

BITUMINOUS CASUALTY CORPORATION,

Defendant.

ORDER FOLLOWING FINAL PRETRIAL CONFERENCE

On October 20, 2006, the Court held a final pretrial conference at which it heard oral argument concerning all pending motions filed in this matter. After hearing oral argument on the issues involved, the Court made the following rulings:

- Plaintiffs' Motion for Reconsideration of Dismissal of First Party Bad Faith Claims (dkt no. 364)- **DENIED**;
- Defendant's Motion in Limine For A Ruling That Pennsylvania Law Shall Apply To All Substantive Issues In This Litigation (dkt no. 389)- **DENIED**;
- Plaintiffs' Motion in Limine No. 1 (dkt no. 365)- **GRANTED**;
- Plaintiffs' Motion in Limine No. 2 (dkt no. 366)- **GRANTED**;
- Plaintiffs' Motion in Limine No. 3 (dkt no. 367)- **HELD IN ABEYANCE** to the extent such evidence is being offered as substantive evidence and **DENIED** to the extent that such evidence is being offered with respect to the plaintiffs' character for untruthfulness under Federal Rule of Evidence 608;
- Plaintiffs' Motion in Limine No. 4 (dkt no. 368)- **GRANTED** to the extent the defendant intended to introduce the

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after-acquired surveillance in its case-in-chief and **HELD IN ABEYANCE** as to whether the defendant may use the after-acquired evidence as rebuttal evidence;

- Plaintiffs' Motion in Limine No. 5 (dkt no. 369)- **DENIED**;
- Plaintiffs' Motion in Limine No. 6 (dkt no. 370)- **DENIED**;
- Plaintiffs' Motion in Limine No. 7 (dkt no. 371)- **DENIED**;
- Plaintiffs' Motion in Limine No. 8 (dkt no. 372)- **DENIED**;
- Plaintiffs' Motion in Limine No. 9 (dkt no. 373)- **DENIED**;
- Plaintiffs' Motion in Limine No. 10 (dkt no. 374)- **DENIED**;
- Plaintiffs' Motion in Limine No. 11 (dkt no. 375)- **DENIED**;
- Plaintiffs' Motion in Limine No. 12 (dkt no. 376)- **DENIED**;
- Plaintiffs' Motion in Limine No. 13 (dkt no. 377)- **DENIED**;
- Plaintiffs' Motion in Limine No. 14 (dkt no. 378)- **DENIED**;
- Plaintiffs' Motion in Limine No. 15 (dkt no. 379)- **DENIED AS MOOT**;
- Plaintiffs' Motion in Limine No. 16 (dkt no. 380)- **DENIED AS MOOT**;
- Plaintiffs' Motion in Limine No. 17 (dkt no. 381)- **HELD IN ABEYANCE** to the extent such evidence is being offered as substantive evidence and **DENIED** to the extent that such evidence is being offered for impeachment purposes;
- Plaintiffs' Motion in Limine No. 18 (dkt no. 382)- **WITHDRAWN** by the plaintiffs on the basis that the Court will provide a limiting instruction on the use of the evidence concerning a potential medical malpractice suit;
- Plaintiffs' Motion in Limine No. 19 (dkt no. 383)- **DENIED** to the extent that the plaintiffs' traffic ticket and traffic offense history are being offered for impeachment purposes;
- Plaintiffs' Motion in Limine No. 20 (dkt no. 384)- **WITHDRAWN** by the plaintiffs on the basis that the Court will provide a limiting instruction on the use of the evidence concerning a potential lawsuit arising from an accident which occurred in 2002 in Florida;
- Plaintiffs' Motion in Limine No. 21 (dkt no. 385)- **GRANTED**;
- Plaintiffs' Motion in Limine No. 22 (dkt no. 386)-

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DENIED;

- Plaintiffs' Motion in Limine No. 23 (dkt no. 387)- **HELD IN ABEYANCE** to the extent such evidence is being offered as substantive evidence and **DENIED** to the extent that such evidence is being offered with respect to the plaintiffs' character for untruthfulness under Federal Rule of Evidence 608;
- Defendant's Evidentiary Motions in Limine (dkt no. 391)-
 - ▶ Motion No. 1- **DENIED AS MOOT**;
 - ▶ Motion No. 2- **DENIED AS MOOT**;
 - ▶ Motion No. 3- **DENIED AS MOOT**;
 - ▶ Motion No. 4- **DENIED AS MOOT**;
 - ▶ Motion No. 5- **DENIED AS MOOT**;
 - ▶ Motion No. 6- **HELD IN ABEYANCE** until the questioning of the expert witnesses at trial;
 - ▶ Motion No. 7- **DENIED**, but the Court **DIRECTED** defense counsel to submit a proposed limiting instruction for this evidence;
 - ▶ Motion No. 8- **GRANTED**;
 - ▶ Motion No. 9- **DENIED**, but the Court **INSTRUCTED** plaintiffs' counsel that evidence concerning other claims or suits involving Bituminous must be germane to the issues present in this case and offered solely for the purpose of establishing a general business practice as required by Syl. Pt. 3, Jenkins v. J.C. Penney Cas. Ins. Co., 280 S.E.2d 252 (W.Va. 1981);
 - ▶ Motion No. 10- **DENIED AS MOOT**;
 - ▶ Motion No. 11- **GRANTED**;
 - ▶ Motion No. 12- **HELD IN ABEYANCE** until the parties submit further briefing on the issue of reinsurance;
 - ▶ Motion No. 13- **DENIED AS MOOT**, but the Court **INSTRUCTED** the parties that they must provide the opposing side with a list of witnesses and exhibits two days prior to offering those witnesses and exhibits at trial and such disclosure must be made by 5:00 p.m.;
 - ▶ Motion No. 14- **DENIED**;
 - ▶ Motion No. 15- the Court will permit the defendant

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to introduce the surveillance taken prior to settlement in its case-in-chief, but prohibited the defendant from introducing the post-settlement surveillance in its case-in-chief. The Court, however, **HELD IN ABEYANCE** its ruling on whether the defendant may introduce the after-acquired evidence as rebuttal evidence;

- ▶ Motion No. 16- **DENIED** to the extent that the plaintiffs intend to use such evidence to establish bias on the part of Robert Rofus; and
- ▶ Motion No. 17- **DENIED**.

It is **SO ORDERED**.

The Clerk is directed to transmit copies of this order to counsel of record.

DATED: October 24, 2006.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE